NO. 43603-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID DANIELS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge
The Honorable Katherine M. Stolz, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ISSUE IN REPLY[1]

Do the appellant's convictions for promoting commercial sexual abuse of a minor (PCSAM) and second degree promoting prostitution violate the prohibition on double jeopardy?

B. ARGUMENT IN REPLY

THE CONVICTIONS VIOLATED THE PROHIBITION ON DOUBLE JEOPARDY, AND THE LESSER OFFENSE SHOULD BE VACATED.

The State argues in its brief the convictions for the two offenses do not violate double jeopardy. It argues that the crime of promoting prostitution requires that the person profit from sexual conduct -- sexual contact or sexual intercourse -- with another person. Brief of Respondent (BOR) at 10 (citing RCW 9A.88.030(1)). On the other hand, PCSAM requires only that the person engaging in the activity engage in sexual conduct, without any requirement that the sexual contact occur with another person.[2] BOR at 11. From this, one is to infer that PCSAM contains an element that promoting prostitution does not. BOR at 13.

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[1] Daniels now concedes that, under the Sentencing Reform Act, the community custody term imposed was not erroneous.

[2] The State incorrectly observes that the to-convict instruction for PCSAM omits a portion of the pertinent statute. BOR at 7 n. 8 (citing CP 31). The version of the statute to which the State cites was not yet in effect in January and February 2012 when the crimes were alleged to have occurred. See Laws 2012, ch. 144, § 1, effective June 7, 2012 (inserting

To analyze a double jeopardy claim, this Court first examines the statutory language to see if the statutes expressly permit punishment for the same act or transaction. Where, as here, the statutes do not speak to multiple punishments for the same act,[3] this Court next engages in a "same evidence" analysis. State v. Hughes, 166 Wn.2d 675, 681-82, 212 P.3d 558 (2009). Under the "same evidence" or Blockburger test, convictions violate double jeopardy if the offenses are identical in fact and in law. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The primary question is "whether each provision requires proof of a fact which the other does not." Id. at 304. "Requires" is the operative word. In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 820, 100 P.3d 291 (2004). In Blockburger, for example, a single sale of morphine was properly punished as two different offenses because each offense *required* proof of a fact which the other did not. Id.

As the State points out, when considered in the abstract, the two crimes here *may* be proved by different facts. But this Court must engage in additional analysis to complete its "same evidence" analysis. It is not enough merely to compare the statutory provisions at their most abstract. State v. Nysta, 168 Wn. App. 30, 46-47, 275 P.3d 1162 (2012) (citing

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"or a sexually explicit act" in subsection 1 of statute).

[3] BOR at 7.

Orange, 152 Wn.2d at 818); see also In re Francis, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010) (finding double jeopardy violation based on application of merger doctrine). Rather, this Court must consider the elements of the crimes both as charged and as proven. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The question is whether the evidence required to support the conviction for either crime would have been sufficient to warrant a conviction upon the other. Orange, 152 Wn.2d at 820.

Here, while the State takes pains to imagine a situation in which, for purposes of PCSAM, sexual contact need not entail sexual contact with *another*, BOR at 11, the State's case on both counts relied on evidence Daniels promoted N.J.'s sexual contact with third parties. See, e.g., BOR at 3-4 (recounting evidence at trial, presumably in the light most favorable to the State).

In other words, the statute permits conviction of PCSAM based on the minor's sexual contact or sexual intercourse with another, or sexual contact with himself or herself. While the jury was instructed on all three forms of sexual conduct under the applicable version of the statute, CP 30, there was no evidence remotely similar to the scenario imagined in the State's briefing. As charged and as proven, the evidence of PCSAM involved sexual contact with another. This was the only evidence of sexual contact. Blockburger, 284 U.S. at 304. Under the test set out in

Blockburger, and explained in detail in Orange, the crimes are presumptively the same. Cf. Nysta, 168 Wn. App. at 50 (felony harassment, via death threat, was one of two ways to prove forcible compulsion element of second degree rape; but *as case was charged and proved*, second degree rape did not *require* proof of death threat).

Although the result of the same evidence test creates a strong presumption of the legislature's intent, it is not always the final word on whether two offenses are the same in law. State v. Calle, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). This presumption can "be overcome only by clear evidence of contrary [legislative] intent." Id.

Here, the State relies on three claimed indicia of contrary legislative intent: (1) placement in different locations in the Revised Code of Washington; (2) the relative severity of the offenses; and (3) in a footnote, the legislative history. BOR at 6, 11-12. The crimes do appear in different chapters of the code. Chapter 9.68A RCW deals with the sexual exploitation of children. Chapter 9A.88 deals with, in part, prostitution. But both chapters punish individuals for perpetuating a similar societal ill – the exploitation of (at least potentially) vulnerable individuals.

As for the second suggested indicator: The State cites no pertinent authority for the proposition that differing severity levels indicate, in the present context, intent to publish separately. BOR at 6 (citing State v. Clark,

170 Wn. App. 166, 193, 283 P.3d 1116 (2012)). The case the State relies on, Clark, discusses instead relative degrees of crime in context of Clark's "merger" argument in that case. But the merger doctrine only applies where the legislature has clearly indicated that to prove a particular degree of crime, the State must prove that the crime was accompanied by an act defined as a crime elsewhere in the criminal statutes. Id. Daniels has not made any "merger" argument in this case. The State's "authority" for this proposition is illusory.

Third, the State cites legislative history dealing with amendments to the statutes prohibiting child pornography, a separate crime. BOR at 12, n. 15; RCW 9.68A.001. Needless to say, the legislature's intent in amending statutes that are not at issue in this case is of questionable value.

Daniels is aware of no authority, and the State cites none, suggesting that placement in separate sections of the code is sufficient to overcome the presumption deriving from the "same evidence test." See Calle, 125 Wn.2d at 780 (result of Blockburger test may be overcome only by clear evidence of legislative intent to the contrary). As charged and as proved, the convictions violated the prohibition against double jeopardy.

Finally, the State argues that, even if the crimes were the same in law, they were not the same in fact – despite the fact that the charging period for each was identical. In closing, the prosecutor attempted to differentiate

between the two charges by date, even though the charging periods were identical as to each. But the argument can be read as a suggestion at best. CP 6-8, 31, 45. As argued in the appellant's opening brief, moreover, the Supreme Court has rejected the adequacy of a similar prosecutorial "election" as a basis to affirm in the face of an apparent double jeopardy violation. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008); cf. State v. Davis, __ Wn. App. ___, __ P.3d ___, 2013 WL 1831163 at *3-4 (Apr. 30, 2013) (rejecting double jeopardy claim based on "unit of prosecution" argument, where convictions for first degree assault and attempted murder were based on Davis filing different guns at officer in different locations).

As the jury was correctly instructed, the lawyer's remarks are not entitled to the same consideration as the evidence and the court's instructions. State v. Curtiss, 161 Wn. App. 673, 670, 250 P.3d 496 (2011). And here, nothing in the instructions informed the jurors that they were prohibited from convicting Daniels of promoting prostitution based on acts contemporaneous to acts constituting PCSAM.[4] As the State's brief acknowledges, "when the [prostitute] is a minor, the State is unable to create a hypothetical where promoting prostitution . . . would not

[4] This would have been simple to remedy, for example, by adding language to each to-convict instruction indicating that each charge must be proved by conduct distinct from that proving the other charge. CP 31, 45.

necessarily constitute PCSAM." BOR at 11, n. 14. The same concerns and same potential for confusion present in Kier are thus present in this case. The rule of lenity requires vacation of the promoting prostitution conviction. Kier, 164 Wn.2d at 814.

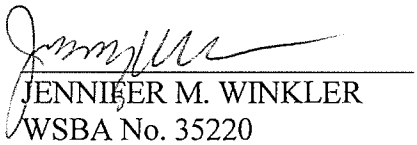
C. CONCLUSION

For the reasons set forth above and in Daniels's opening brief, this Court should find the convictions on both charges violate the prohibition against double jeopardy. The lesser charge, promoting prostitution, should be vacated, and Daniels should be resentenced on the remaining charge based on a corrected offender score.

DATED this 6TH day of May, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID DANIELS
DOC NO. 349970
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MAY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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